

MEMORIAL

in Campbell

F O R

Lord Minto

Colin, Duncan, and Margaret Campbells, Executors
qua nearest of Kin decerned to the deceased
Katharine Campbell their Mother, Pursuers.

*Campbell (Colin)
of Killinalan*

KATHARINE CAMPBELL, Mother to the Memorialists,
was first married to *John Campbell* of *Killinalan*,
and the Pursuers are the Issue of that Marriage.

At the Dissolution of it, by the Predecease of their
Father, there were several Children living; and their Father,
not imagining his Widow would have entertained Thoughts of a
second Marriage, left her the most considerable Part of his Ef-
fects, besides Moveables, to near the Extent of *L. 500*; she
was provided in a Liferent-Annuity; and the Benefit of a lu-
crative Tack, of which several Years were then to run.

This Over-tenderness of their Father had the contrary Ef-
fect from what he intended. Widows, in these Circumstances,
frequently become a Prey to indigent and designing Men; which
was the Fate of their Mother, who, in the 1729, about a
Year after their Father's Death, entered into a second Mar-
riage with *John Campbell* of *Ardnave*, the Defender, a young
Man, with no other Estate than what Cattle was sufficient to
stock a Fourth-part or Quarter of a small Highland Grasing.

As the Defender's principal View in this Marriage was to se-
cure himself the Possession of his Wife's Estate, in the Event of
her Death; so he very early laid a Plan for bringing it about.
In the Year 1733, he took all his Bills with a Clause, seclu-
ding Executors; but being advised, that this would prove in-
effectual, he was at a stand for some time, till the following
Incident, and his own happy Invention, relieved him.

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In the Year 1741, *Alexander Campbell* of *Killinalan* died, and left the Defender his Executor, and universal Legatar, with the Burden of paying his Debt, and some Legacies; and as his Dealings had been pretty extensive, it happened that, at the Time of his Death, there were considerable Sums of Money due to him; and also several Sums due by him, besides the Legacies he had bequeathed: so that his Debts and Effects, taken together, amounted to near *L. 2000 Sterling*. This gave the Defender a large Field to work upon; of which he resolved to make the best. And the Method he took was very artful: He converted the most considerable Part of *Killinalan's* Effects, as well as the Debts due to him, into Bonds, secluding Executors, payable to himself, thereby to prevent the Wife and Children from having any Share of them, as falling under Communion; and he granted his own Bills to *Killinalan's* Creditors and Legatars, to the Extent of *L. 500 Sterling*, with which he meant to burden the Goods in Communion.

Thus far he completed his Scheme in 1745; and in this Situation Matters remained till *September 1748*, that his Wife contracted the Illness of which she died about a Month after. There were still some Subjects that might fall under Communion. The Defender was Creditor to several Persons by Bills and small Accounts; and particularly to *James Campbell* of *Ballenaby*, in about *L. 73*; and there were likewise Cattle upon the Tack-lands. No sooner his Wife's Recovery was despaired of, in *September 1748*, than he took a Bond, secluding Executors, from *Ballenaby*, for *L. 73 : 11 : 9*, the Amount of all the small Articles due by him, which is dated 5th *September 1748*, and payable five Days thereafter: And further, at that unseasonable Time of the Year, he disposed of Cattle to the Extent of *L. 45 Sterling*, to *Gillies* of *Duchra*; from whom he also took Bond, dated the 20th *September*, and payable five Days thereafter.

This Marriage having dissolved without Issue, by the Predecease of the Wife, the Pursuers, as her Executors *qua* nearest of Kin, were advised to bring an Action against the Defender, for the



the Half of the Goods in Communion at the Time of their Mother's Death.

Their Right to insist in it was not disputed ; and the Defender was ordained to exhibit an Account of the Goods in Communion ; which he did by way of Charge and Discharge, in which he took Credit for all the Bills he had granted to *Killinalan's* Creditors and Legatars, though he had not charged himself at all with the Bonds he had taken from *Killinalan's* Debtors.

The Pursuers objected to this Account, That as there was Sufficiency of *Killinalan's* Effects to pay his own Debts, the Goods in Communion ought not to be burdened with the Bills granted to *Killinalan's* Legatars, otherwise the Bonds taken from *Killinalan's* Debtors should have been also brought into the common Stock.

The Facts were not controverted by the Defender : But it was pleaded for him, That, in virtue of a Husband's Power to administrate Goods in Communion, it was lawful for him to manage *Killinalan's* Executry in what Manner he should think proper for his own behoof.

The Lord *Minto* Ordinary having repelled the Objections to the Bills, Application was made to the haill Lords by Petition ; which being advised, with Answers, they, by Interlocutor, 2d March 1756, " before Answer, ordained the Defender to produce the several Bonds taken for *Killinalan's* Executry ; and " remit to the Lord Ordinary to hear Parties Procurators thereon, and to report."

A List of Bonds was accordingly given in by the Defender, of which a Copy is subjoined ; and the Lord Ordinary having taken the Matter to Report, and ordained Memorials to be given in on the State of the Debts, what follows is humbly offered on the Part of the Pursuers.

The Pursuers apprehend, the Intention of the Court, by the above Interlocutor, was, that they might have a full View of the State of *Killinalan's* Executry ; and therefore that it was incumbent

incumbent on the Defender to have given in a Condescendence of all the Bonds which belonged to him as Executor of *Killinalan*, whether they were originally due to *Killinalan* himself, or taken by the Defender after his Death for his Effects: Whereas, in the Condescendence now given in, three very material ones are omitted; as will appear from a List of them subjoined to the Condescendence.

The Condescendence given in by the Defender, in Obedience to the above Interlocutor, is sufficient Proof, that all the Bonds therein mentioned, (one heritable Bond excepted), were granted for *Killinalan's* Executry; from which it appears, he meant to secure to himself L. 554 : 18 : 5 of *Killinalan's* Executry, and that besides the above three Bonds, and the Bonds granted by *Balenaby* and *Duchra*. It indeed appears, upon comparing the Sums in the Bonds with the confirmed Testament, that some of the Bonds are for greater Sums than seem to have been due to *Killinalan*. But this Difference was occasioned by the Price of some of *Killinalan's* Effects, which were bought, after his Death, by these Debtors, and added to the Sums originally due.

The Pursuers do not mean to controvert the Husband's Right of administering the Goods in communion; and they are not ignorant, with what Difficulty the fixing any certain Bounds to a Husband's Power may be attended. They do even admit, that it is, in some Cases, nearly equal to a Right of Property; so that he may alienate, when there is a rational, though not strictly onerous Cause. But they do humbly contend, That, by the Law of this Country, a Wife has a Right in the Goods in communion, which her Husband cannot fraudulently deprive her of; and that the Law will not countenance Deeds done by a Husband, which are avowedly calculated to hurt his Wife's Interest. The Words of the learned Author of the late Institute to this Purpose are very clear. *Such Deeds as have been granted in defraud of the Wife's Right, will be void, on the Head of Deceit.* And this is agreeable to the Decisions of the Court,

as oft as Cafes of that Nature have occurred ; particularly, 10th January, 1679, *Grant contra Grant*.

The Application of these Principles to the present Cafe is obvious. It is impossible, the Pursuers will be allowed to say, to figure a more avowed Intention of prejudging a Wife's Interest, than in the whole Behaviour of this Defender, who, very soon after his Marriage, appears to have laid a Plan, of which he never lost Sight till the last Hour of it ; and even then, he appears innovating Securities, and disposing of his Effects, and converting the same into Bonds ; which, to prevent Accidents, he makes payable five Days after Date ; and all this while his Wife was on Deathbed, and a very few Days before she died. The disposing of Cattle at that Time of the Year, was a very uncommon Act of Management, and what no Dealer in Cattle would have dreamed of, except with some particular View. And that the Defender had such Views, will appear from this single Consideration, that he immediately bought other Cattle, in place of those he had sold *Gillies*, which he put upon his Grounds ; and for the Price of which he granted his own Bills ; which were allowed to lie over till after his Wife's Death.

The Pursuers further contended, That the Defender, as Executor nominate by *Killinalan*, was but Trustee for Payment of *Killinalan's* Debts and Legacies ; and it was but the Residue of *Killinalan's* Effects, after Payment of the Debts and Legacies, to which the Defender became intitled ; insomuch, that it will not be disputed, that *Killinalan's* Creditors and Legatees would have been preferable, upon the Executry-effects of *Killinalan*, to the Defender's proper Creditors. Nor could this Preference be frustrated by the Defender's Address and Cunning, in taking Bonds in his own Name for the Effects of *Killinalan's* Executry. A Consequence of this is, that though the Defender, towards the Accomplishment of his fraudulent Contrivance, granted his own Bills to the Creditors and Legatees of *Killinalan*, this would not intitle the Defender to withdraw the Effects of *Killinalan's* Executry, for which he had taken Bonds to himself, and at

the same Time, to leave the Debts and Legacies due by *Killinalan*, for which he had granted his own Bills, to exhaust the Goods in communion at his Wife's Death.

The Defender falls to be considered, in this Question, as *sustinens duplicem personam* ; first, as Trustee and Executor of the Will of *Killinalan*, whereby he becomes intitled to the free Residue of *Killinalan's* Effects, after Payment of his Debts and Legacies, which he might have disposed of any Way he thought proper ; 2dly, as the Husband or Administrator of the Effects in communion, during the standing of the Marriage.

And as these must be considered as two separate Estates, centering in the same Person, the Pursuers, with great Submission, contend, That as *Killinalan's* Executry was, in the first place, applicable for Payment of his own Debts, the Residue of which only belonged to the Defender ; and as the Creditors of *Killinalan* were preferable, upon *Killinalan's* Executry, to the Defender's proper Creditors ; so, *vice versa*, *Killinalan's* Executry was liable in Relief to the Defender's proper Estate of any Debts due by *Killinalan*, paid by the Defender out of the Goods in communion ; or which is, in other Words, the same Thing, as both these vested in the Person of the Defender, that, in accounting for his Wife's Share of the Goods in communion, he cannot exhaust the same by the Bills which he chose to grant for the Debts and Legacies of *Killinalan*, whilst, at the same Time, he is possessed of *Killinalan's* Executry, to a much greater Extent than is sufficient to answer all these Debts.

R O. C A M P B E L L.

Inventory

Inventory of Bonds produced by *John Campbell*
Tacksman of *Ardnave* in *Islay*, referred to in the
preceding Memorial.

1. **P**Principal Bond, *William Campbell* Tacksman of *Kelsa*, to the said *John Campbell*, his Heirs and Assignies, secluding Executors, for the principal Sum of *L. 57 : 10 : 0½ Sterling*, dated 5th *February* 1745, payable at *Whitsunday* thereafter, with Annualrent from the said Term of Payment.

2. Principal Bond, *James Campbell* of *Ballinaby*, to the said *John Campbell*, his Heirs and Assignies, secluding Executors, for *L. 270 : 10 : 7½ Sterling*, dated 17th *September* 1745, payable at *Whitsunday* thereafter, with Annualrent from *Whitsunday* preceding the Date of the Bond.

3. Retired Bond, *Donald Campbell* of *Killinalan*, with Consent therein mentioned, to the said *John Campbell*, his Heirs and Assignies, secluding Executors, for *L. 58 : 6 : 8½ Sterling*, dated 19th *September* 1745, with Annualrent from *Whitsunday* preceding the Date of the Bond.

4. Principal heritable Bond, *James Campbell* of *Ballinaby*, to the said *John Campbell*, his Heirs and Assignies, secluding Executors, for the Sum of 2500 Merks *Scots Money*, dated 7th *July* 1748, payable at *Whitsunday* thereafter, with Annualrent from *Whitsunday* preceding the Date of the Bond, which contains ~~Obbligement~~, Procuratory, and Precept for infefting in the Lands of *Grunart, &c.* in security of the Sums.

5. Principal Bond, *James Campbell* of *Ballinaby*, to the said *John Campbell*, his Heirs and Assignies, secluding Executors, for *L. 73 : 11 : 1½ Sterling*, dated 5th *September* 1748, payable 12th *September* then current, with Annualrent from *Whitsunday* preceding the Date of the Bond.

6. Retired

6. Retired Bond, John Gillies of Duchra, to the said John Campbell, his Heirs or Assignies, secluding Executors, for L. 45 Sterling, dated 21st September 1748, payable the 26th of said Month, with Annualrent from the Term of Payment.

N. B. Mr John Campbell Minister of Islay and his Son's Bond for L. 40 Sterling, 8th August 1746, is registered in the Books of Session, in December 1754, and was sent to the Country with Diligence.

Bonds taken by Ardnave for Killinalan's Executry, which ought to have been mentioned by him in the preceding Condescendence.

1mo, Bond, Colin Campbell of Ardnabow, dated the 8th of May 1737, and payable to Killinalan at Martinmas thereafter, for L. 107.

Item, Bond, Archibald Campbell of Jura, dated 18th August 1744, payable at Martinmas 1744, for L. 86 : 4 : 4.

N. B. This was for Part of Killinalan's Cattle sold by Ardnave.

Item, Bond, Campbell of Loffet, dated 14th May 1729, payable to Killinalan at Martinmas thereafter, for L. 111 : 2 : 2 $\frac{1}{2}$ Sterling.

Duchinleck where a husband has lain out money with a view to defraud his wife of her third, she will be released & have a third:

The two bonds granted on Death bed excluding executors are to be considered as fraudulent & to be deemed inoperative. The husband has the power of disposal at pleasure but he must not do anything to invert the property & his intention can only be found out by the nature of the transaction. agrees as to the two bonds, but more cannot appear to make them fraudulent, that must appear from the cause of granting enquire into it — the exclusion of executors is of no weight.

